Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12–77 OF 1995
LOW HOP BING J
20 OCTOBER 1997

Damages (Personal Injury or Death) *— Action for — Recovery of damages — Defendant 10% liable for accident — Whether innocent passenger entitled to recover 100% against defendant — Whether vicarious liability applicable — Whether passenger ceases to be an innocent passenger if he is the owner of the car involved in the accident and the car was driven with his authority*

The respondent ('the plaintiff') was the registered owner of and a passenger in a car which was involved in a collision with the first defendant's car, driven by the second defendant. The plaintiff was travelling with his son ('SP2') who was authorized by the plaintiff to drive the car. The plaintiff brought an action against the defendants. The sessions court judge held that the defendants were 10% liable for the accident and since the plaintiff was an innocent passenger at all material times, the plaintiff was entitled to damages on a 100% basis. The defendants appealed. It was submitted that the plaintiff was not an innocent passenger because of the fact that the plaintiff was the owner of the car and SP2 was driving the car with the authority of the plaintiff. Therefore, the plaintiff was vicariously liable for the negligence of SP2 who was 90% liable for the accident. The issue before the court was whether the plaintiff was an innocent passenger and so was entitled to damages on a 100% basis.

Held, dismissing the appeal:

(1) Once a person has proved that he is an innocent passenger, he is entitled to a claim based on 100% liability. It is the personal prerogative of the innocent passenger to sue the negligent party responsible for causing damage or injury to him in the accident. Based on authorities, an innocent passenger is entitled to 100% damages regardless of whether the negligence is attributable to the driver of the vehicle in which he was a passenger or the driver of the other vehicle (see pp 642I and 643D).

(2) It is settled law that in the absence of any evidence from the owner, the presumption that the driver of the car is driving as the servant or agent of the owner applied. However, the doctrine of vicarious liability is separate and distinct from the issue of the rights of the plaintiff as an innocent passenger. SP2 had not been made a party to this action either as a co-defendant or a third party. The important question to be addressed, having specific reference to the facts of the instant case, is that once a person such as the plaintiff is proved to be an innocent passenger, he is always to be an innocent passenger. Therefore, the plaintiff, as an innocent passenger, did not cease to be an innocent passenger

merely by being established as the owner of the car driven by his son on his instructions (see p 644C–F). A

[Bahasa Malaysia summary

Penentang ('plaintif') adalah pemilik berdaftar dan seorang penumpang dalam kereta yang terlibat dalam suatu pelanggaran dengan kereta defendan pertama, yang dipandu oleh defendan kedua. Plaintif sedang dalam perjalanan dengan anak lelakinya ('SP2') yang diberi kuasa oleh plaintif untuk memandu kereta tersebut. Plaintif membawa tindakan terhadap defendan-defendan. Hakim mahkamah sesyen memutuskan bahawa defendan-defendan bertanggungjawab sebanyak 10% atas kemalangan dan oleh kerana plaintif adalah penumpang yang tidak bersalah pada semua masa material, plaintif berhak mendapat ganti rugi pada dasar 100%. Defendan-defendan merayu. Adalah dihujahkan bahawa plaintif bukanlah penumpang yang tidak bersalah disebabkan hakikat bahawa plaintif adalah pemilik kereta dan SP2 memandu kereta dengan kebenaran plaintif. Oleh itu, plaintif bertanggungjawab secara vikarius untuk kecuaian SP2 yang bertanggungjawab sebanyak 90% atas kemalangan. Isu di hadapan mahkamah ialah sama ada plaintif merupakan penumpang yang tidak bersalah dan berhak mendapat ganti rugi pada dasar 100%. B C D

Diputuskan, menolak rayuan: E

(1) Selepas seseorang membuktikan bahawa dia adalah penumpang yang tidak bersalah, beliau berhak membuat tuntutan berdasarkan liabiliti 100%. Adalah prerogatif peribadi penumpang yang tidak bersalah untuk mendakwa pihak cuai yang bertanggungjawab kerana menyebabkan kerosakan atau kecederaan kepadanya dalam kemalangan. Berdasarkan autoriti-autoriti, penumpang yang tidak bersalah adalah berhak mendapat ganti rugi 100% tanpa mengira sama ada kecuaian dapat dianggap disebabkan oleh pemandu kenderaan dalam mana dia merupakan penumpang atau pemandu kenderaan yang satu lagi (lihat ms 642I dan 643D). F G

(2) Adalah undang-undang mantap bahawa dalam ketiadaan sebarang keterangan daripada pemilik, anggapan bahawa pemandu kereta memandu sebagai pekerja atau ejen pemilik kereta adalah terpakai. Namun demikian, doktrin liabiliti vikarius adalah berasingan dan berbeza dengan isu hak plaintif sebagai penumpang yang tidak bersalah. SP2 tidak dijadikan pihak kepada tindakan ini sama ada sebagai defendan bersama atau pihak ketiga. Persoalan yang penting untuk menumpukan perhatian, dengan merujuk secara khusus kepada fakta-fakta kes ini, adalah bahawa sebaik sahaja seseorang seperti plaintif dibuktikan adalah penumpang yang tidak bersalah, dia selamanya adalah penumpang yang tidak bersalah. Maka, plaintif, sebagai penumpang yang tidak bersalah, tidak berhenti menjadi penumpang yang tidak bersalah semata-mata kerana ditunjukkan sebagai pemilik kereta yang dipandu oleh anak lelaki atas arahannya (lihat ms 644C–F).] H I

Notes

For cases on action for damages (personal injury or death), see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 244–259.

Cases referred to

Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor [1997] 2 CLJ 775 (refd)

Jayakumar s/o Kuppusamy & Anor v Chen Kit Hong & Anor [1984] 1 MLJ 376 (refd)

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)

Kayat & Anor v Lim Yew Seng [1972] 1 MLJ 26 (refd)

Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 (refd)

Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244 (refd)

Pratt v Patrick & Ors [1924] 1 KB 488 (refd)

Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor [1993] 4 CLJ 291 (refd)

Samson v Aitchison [1912] AC 844 (refd)

Samsuri bin Saad & Anor v Chew Kit Toh (t/a Thong Woh Hup) and another appeal [1996] 1 MLJ 576 (refd)

See Keng Wah v Lim Tew Hong [1957] MLJ 137 (refd)

Su Key & Ors v Shanmugam & Anor [1966] 1 MLJ 98 (refd)

Wong Fook & Anor v Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party) [1991] 1 MLJ 46 (refd)

Wong It Yong v Lim Gaw Teong & Anor [1969] 1 MLJ 79 (refd)

Appeal from: Summons No 53–663 of 1992 (Sessions Court, Shah Alam)

Siva Dharma Rudra Deva (*Siva Dharma & Associates*) for the appellants.
Joshua T Sambanthan (*Lawrence George & Partners*) for the respondent.

Cur Adv Vult

Low Hop Bing J:

The appeal

On 1 August 1995, the learned sessions court judge in Shah Alam gave judgment for the plaintiff in the sum of RM22,000 by way of general damages and RM300 by way of special damages. The learned sessions court judge held that the defendants were 10% liable for the accident in question and since the plaintiff was an innocent passenger at all material times, the plaintiff was entitled to damages on a 100% basis, ie the defendants were 100% liable for the plaintiff's claim. The award, viz, RM22,000 for general damages and RM300 for special damages were indeed based on 100% liability. The defendants (the appellants) appealed against the whole of the said decision.

The issue

The appeal herein involves a pure question of law, ie whether the plaintiff, as the registered owner of the car in which he was travelling with his son as the driver and which was involved in the accident, is an innocent passenger and so is entitled to damages on a 100% basis?

Undisputed facts

The plaintiff was the registered owner of and a passenger in motor car No BW 6197 at the time of the accident on 29 September 1991. The driver was the plaintiff's son who was authorized by the plaintiff to drive the said car. The first defendant was the registered owner of motor car No BCD 23 at all material times, which was driven by the second defendant as the first defendant's servant and/or agent. On the said date, a collision occurred between these two motor cars.

The defendants' submission

It was submitted for the defendants that since the plaintiff was the registered owner of motor car BW 6197 and that his son (SP2) was driving the said motor car with the authority of the plaintiff — who was seated in the front passenger seat beside SP2 — the plaintiff had control over the conduct of SP2.

Further, the journey undertaken by the plaintiff and SP2 was for a common purpose, ie to return from Kuantan to their house at 76 Lorong 6/30, 46000 Petaling Jaya. Hence, the plaintiff is vicariously liable for the negligence of the driver, SP2. Since the learned sessions court judge apportioned 10% liability on the part of the defendants, it would follow that SP2, the driver of the plaintiff's car, was 90% liable. Therefore, the plaintiff as the registered owner of the car and the principal of SP2 is vicariously liable for the negligent driving of SP2, to the extent of 90%, in which event there should be a proper apportionment of liability.

The plaintiff's submission

It was submitted for the plaintiff that the defendants have neither specifically pleaded the issue of vicarious liability in the statement of defence nor raised this issue prior to the appeal herein. Further, the defendants have failed to add SP2 as a co-defendant or a third party to these proceedings. In any event, the plaintiff was an innocent passenger and as such he could not be held vicariously liable for the negligence of SP2.

Decision of the court

The issue to be decided has been formulated above. The question as to whether a person is an innocent passenger is one of mixed law and fact. Once a person has proved that he is an innocent passenger, he is entitled to a claim based on 100% liability. It is the personal prerogative of the innocent passenger to sue the negligent party responsible for causing damage or injury to him in the accident.

In *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244, the plaintiff was the owner of premises known as No 196, Bencoolen Street, Singapore. On the day of the accident, the first defendant drove his car and the second defendant drove his taxi so negligently, thereafter ran into, collided with and damaged the plaintiff's premises. The collision took place at an intersection, whereby both vehicles went off the road and hit the plaintiff premises. Choor Singh J of the Singapore High Court held that as the plaintiff is an innocent third party, it is enough for him to prove negligence against the second defendant even if it is not the whole of the negligence and so recover the whole of the damages awarded in this case.

In *Wong Fook & Anor v Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party)* [1991] 1 MLJ 46, the first and second plaintiffs are passengers in a car driven by a third party, Wong Piang Loy, when an accident occurred between the said car and a van driven by the defendant. Abdul Malek J (as he then was) of the Ipoh High Court held that a passenger in a car is entitled to 100% damages regardless of whether the negligence is attributable to the driver of the car in which he was a passenger or the driver of the van which collided into the car

Wong Fook's case was cited by Abdul Malik Ishak JC (as he then was) of the Taiping High Court in *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291. In *Reliance*'s case, there was a claim for damages arising from an accident between a motorcycle ridden by the first plaintiff with the second plaintiff seated as a pillion rider and a motorbus. Abdul Malik Ishak JC held, inter alia, that the second plaintiff was an innocent third party (a pillion rider) and is entitled to recover the whole of the damages, adding that it was the prerogative of the pillion rider whether to recover the whole of the damages (100%) against the defendant or the first plaintiff.

In *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Thong Woh Hup) and another appeal* [1996] 1 MLJ 576, a question arose whether the pillion rider was entitled to recover 100% against the respondent when the learned sessions court judge found that both the deceased rider of the motorcycle and the driver of the motorlorry were equally blameworthy. Abdul Malik Ishak J followed *Reliance* and *Oli Mohamad*, and held that the pillion rider was an innocent party and is entitled to recover 100% against the respondent.

The above authorities are in line with the common law principles which were stated with clarity in 28 *Halbury's Laws of England* (3rd Ed) at para 100 p 95 as follows:

> ... where a person travelling as a passenger in a vehicle belonging to a third person is injured by the negligence of the defendant, he is entitled to recover in full against the latter notwithstanding that the driver of the vehicle in which the plaintiff is travelling may also have been guilty of some negligence contributing to the accident.

The above passage was quoted with approval by Mohamed Dzaiddin J (as he then was) in *Jayakumar s/o Kuppusamy & Anor v Chen Kit Hong & Anor* [1984] 1 MLJ 376.

Vicarious liability

The defendants in the appeal before me do not dispute the principle that an innocent passenger is entitled to damages on a 100% basis upon the slightest finding of negligence against the defendants, but submitted that the plaintiff is not an innocent passenger by reason of the fact that the plaintiff was the owner of motor car No BW 6197 and the plaintiff was the principal of SP2, as a result of which, the plaintiff was vicariously liable for the negligence of SP2 who was 90% liable for the said accident.

In my judgment, the doctrine of vicarious liability in relation to the owner of a car is settled law. In the absence of any evidence from the owner, the presumption that the driver of the car is driving as the servant or agent of the owner applied: *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61; *Samson v Aitchison* [1912] AC 844; *Pratt v Patrick & Ors* [1924] 1 KB 488; *See Keng Wah v Lim Tew Hong* [1957] MLJ 137; *Kayat & Anor v Lim Yew Seng* [1972] 1 MLJ 26; *Su Key & Ors v Shanmugam & Anor* [1966] 1 MLJ 98; *Wong It Yong v Lim Gaw Teong & Anor* [1969] 1 MLJ 79 (FC); *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC); *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor* [1997] 2 MLJ 775 (CA).

The respondent in the appeal before me did not dispute the doctrine of vicarious liability at all. This doctrine is separate and distinct from the issue of the rights of the plaintiff as an innocent passenger. The driver SP2 has not been made a party to this action herein, either as a co-defendant or a third party. To my mind, the important question to be addressed, having specific reference to the facts of the instant case, is that once a person such as the plaintiff is proved to be an innocent passenger, he is always to be an innocent passenger. In other words, the plaintiff, as an innocent passenger, does not cease to be an innocent passenger merely by being established as the owner of the car driven by his son on his instructions.

Conclusion

In the light of the above grounds, I affirm the learned sessions court judge's decision and dismiss this appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar